

No. 15654

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES MIMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF OF APPELLANT JAMES MIMS.

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Jurisdictional Statement.

I.

Jurisdiction of the District Court.

18 United States Code, Section 3231, provides that:

“The District Courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States.”

Appellant was charged in the United States District Court for the Southern District of California, Central Division, in Indictment No. 25354 of violating United States Code, Title 21, Section 174. (Illegal sale of narcotics.) [T. R. p. 1.]

II.

Jurisdiction of This Court Upon Appeal to Review the Judgment.

28 United States Code, Section 1291, reads:

“The Court of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . . except where a direct review may be made in the Supreme Court.”

28 United States Code, Section 1294, reads in part:

“Appeals from reviewable decisions of the District and territorial Courts shall be taken to the Court of Appeals as follows:

“1. From a District Court of the United States to the Court of Appeals for the Circuit embracing the district; . . .”

Appellant filed his Notice of Appeal on April 10, 1957 from the Judgment entered by the District Court on April 2, 1957. [T. R. p. 25.]

Statement of the Case.

Appellant was accused of the illegal sale of narcotics, violation of United States Code, Title 21, Section 174, in an indictment returned September, 1956. On October 24, 1956, appellant pleaded not guilty to Count 1 of the indictment. [T. R. p. 3.] The defendant proceeded to trial on December 5, 6 and 7, 1957, at which time he was convicted by a jury of the offense charged. [T. R. p. 7.] Thereafter, on motion for a new trial, the Court granted the said motion on the ground that the evidence did not warrant conviction. [T. R. p. 9.] A second trial was had on February 26, 27 and 28, 1957, at which time appellant was convicted by a jury of the offense charged in Count 1, as alleged in the indictment. [R. T.

p. 19.] On April 1, 1957, appellant was sentenced to a period of imprisonment of fifteen years on Count 1 of the indictment. [T. R. p. 24.]

The essential testimony brought out by the government at the trial was that of Federal Narcotics Agent Richards, Frank Sabbath, the alleged accomplice of the defendant (Mr. Sabbath had pleaded guilty to the same offense for which appellant was on trial, and had previously been convicted of a felony [R. T. p. 126, lines 22-25]), and Bonnie Barnett, a convicted perjurer. [R. T. p. 136, lines 19-23.]

Throughout the testimony reference was made to a Mr. Powell, also known as Reverend Powell, also known as Parnell. (Throughout this brief he will be referred to as Mr. Powell.)

Agent Richards testified that he had been told by Mr. Powell that if he called a certain telephone number he could make an arrangement to purchase narcotics. On September 14, 1956, at about 1:45 P. M. Agent Richards called this certain number and a woman answered. [R. T. p. 21, lines 11-14.] Agent Richards asked to speak to James Mims, and a male voice got on the telephone and said "I am Mims. What do you want?" The agent said that he was a friend of the Reverend's and that his name was Deacon Allen, and that he wanted to do some business. The voice said to call back in half an hour, which Agent Richards did. At the time of the second call, the voice said to come down to the place and they could talk, and an address was given. [R. T. p. 21, line 15, to p. 22, line 15.] Agent Richards then went to the address and he observed the defendant Mims looking out the window. [R. T. p. 22, lines 19, 20.] He had never seen the defendant Mims before but he recognized

him from a photograph that he had been given. [R. T. p. 23, line 3.] Agent Richards entered the premises and asked for Mims. The person who Agent Richards identified as Mims said Mims wasn't there but he would be there in a few minutes. Agent Richards sat down and a few minutes later he heard footsteps coming up the stairs and Mims got up from the living room and met Sabbath in the hallway. [R. T. p. 24, line 19, to p. 25, line 3.] Mims and Sabbath walked about half way into the hallway and engaged in a conversation [R. T. p. 28, lines 7-9], which Agent Richards testified that he could not hear. [R. T. p. 56, lines 6-9.] A few seconds later, Sabbath walked back to the entrance of the living room and spoke to Agent Richards. At that time Sabbath asked what Agent Richards wanted, and Agent Richards said he had \$150.00 to spend for some stuff, Sabbath said the price would be \$155.00, and Agent Richards said that all he had was \$150.00. Sabbath then said wait a minute and left Agent Richards and rejoined Mims down the hall. [R. T. p. 29, lines 5-10.] Agent Richards could not hear what Sabbath and Mims said to each other. A few seconds later Sabbath returned to the living room and said to Agent Richards that he would let him have it for \$150.00. Then Sabbath told Agent Richards to wait there and Sabbath left Agent Richards' sight. Meantime, Mims had returned to the living room. About a minute later, Sabbath came back to the living room and told Agent Richards to follow him, and they both walked and entered a room which was located on the west portion of the hallway. At that time Sabbath took out a small brown package and said, "Here is the stuff, open it." [R. T. p. 30, lines 11-21.] Agent Richards paid the \$150.00 to Sabbath while they were in the room. [R. T. p. 32, line 19.] While they were in the room there

was a knock on the door and a woman's voice hollered "Frank, I want to see you." And Agent Richards said, "I thought your name was Mims." and Sabbath said, "Well, they call me Mims sometimes." Sabbath said if he wanted any more stuff to call back the number that Agent Richards had received and ask for James Mims. [R. T. p. 32, line 8.] Agent Richards and Sabbath then left the room and Agent Richards walked down to the porch and later rejoined the other officers. [R. T. p. 32, lines 11, 12,] Agent Richards testified that after he left the room, he observed appellant Mims in the living room. [R. T. p. 32, line 22.] On cross-examination, Agent Richards testified that his office had no record of any kind on a James Mims. [R. T. p. 43, line 2.] He also testified that he did not hear any conversations between Mims and Sabbath [R. T. p. 56], nor did he see any package being exchanged between Mims and Sabbath. [R. T. p. 56, lines 10-12.] Agent Richards testified that he did not know what occurred in the hall. [R. T. pp. 56, 63.] Agent Richards further testified that at a later transaction he called the same phone number and asked to speak to James Mims. He was told that Mims wasn't there and he left a number where he could be called. Later, Sabbath called back and Agent Richards and Sabbath made another sale. [R. T. p. 69, lines 8-25; p. 70, lines 1-2.]

Frank Sabbath was then called and in general testified in the same manner to the sequence of events as Agent Richards had testified as to the happenings in the house. Mr. Sabbath said that his conversations with Mims were in relation to the sale of the narcotics to Agent Richards. Mr. Sabbath testified that when he entered the house, Mr. Mims met him and said, "This guy wants to see

you. See what he wants.” [R. T. p. 110, line 5.] Then Sabbath went and spoke to Agent Richards and Agent Richards said that he wanted to do some business. He wanted to get some stuff. Agent Richards said he had \$150.00 to spend. All this time Mims was in the hall. [R. T. p. 109, line 24; p. 110, line 20.] Then Sabbath went back and spoke to Mr. Mims and asked what would \$150.00 get and Mr. Mims replied half an ounce. [R. T. p. 110, lines 20-24.] Sabbath went back and told Agent Richards about the conversation and Agent Richards said okay. Then Sabbath testified that he went and got the narcotics from Mr. Mims. [R. T. p. 111, lines 1-25.] He said that Mr. Mims was standing in the hall and he gave Sabbath the heroin while they were standing in the hall. [R. T. p. 111, line 13.] Then Mr. Sabbath and Agent Richards went into another room where Mr. Sabbath transferred the narcotics to Agent Richards and received the money from Agent Richards. [R. T. p. 119, lines 3-11.] At this time, appellant Mims was sitting in the living room and Sabbath testified that after the sale was made and Agent Richards had left, he gave the \$150.00 to the defendant Mims. [R. T. p. 113, lines 2-17.] Also at this time Sabbath testified that Miss Barnett was also in the living room. [R. T. p. 113, lines 7-10.]

On cross-examination, the facts were brought out that Mr. Sabbath had pleaded guilty to Count 1 of the same indictment that appellant Mims was on trial for, and that Count 2 of that indictment had been dismissed by the Government. [R. T. p. 123; p. 124, lines 5-7.] Sabbath testified that he had been told that by pleading guilty he might be able to help himself. [R. T. p. 125, line 2.] It was further brought out that at the time

these events took place Sabbath was on probation for statutory rape. [R. T. p. 126; p. 127, lines 1-2.]

On cross-examination, Mr. Sabbath further testified that when he was originally arrested by the Police, he told them that his father had supplied the heroin that was used in the sale to Agent Richards on September 14, 1957. [R. T. p. 123, lines 10-12.]

Bonnie Barnett was then called by the prosecution and testified that she was the woman who answered the first phone call that Agent Richards made. However, she left the room at the time when Mr. Mims was speaking to Agent Richards and therefore could not testify as to the conversation. [R. T. p. 133, line 21.] After that phone call, she testified to a conversation between Mr. Mims and Mr. Sabbath at which time Mr. Mims told Sabbath "there was a man coming to pick up a package and that he owed him some money and he wanted him to give him the package, but not until he collected the money that the man owed Mr. Mims." At that time Miss Barnett testified that she saw appellant Mims give a package to Mr. Sabbath. [R. T. p. 134, lines 9-22.] Miss Barnett then testified that after Agent Richards came, she saw Sabbath hand a package to Mr. Richards and that this occurred in the living room of the premises. She also saw Agent Richards hand some money to Mr. Sabbath. [R. T. p. 135, lines 22-25.] She further testified that after Agent Richards left she saw Mr. Sabbath give the money to Mr. Mims. [R. T. p. 136, lines 14-16.] Then she testified that she had been convicted of perjury. [R. T. p. 136, line 23.]

When appellant Mims took the stand, he admitted that he had talked to the person called Deacon Allen when he first called and denied the second telephone conversation.

[R. T. p. 157, lines 7-18.] He admitted that he was in the house when Agent Richards came to the house. [R. T. p. 157, lines 21-23.] But he testified that he left the house after Sabbath got there. [R. T. p. 163, line 11.] He testified that he never gave any package to Sabbath but that Sabbath had a package on him when he came in. [R. T. p. 162, lines 6-25; p. 166, lines 19-21.] He testified that he never received any money from Sabbath that day and he also testified that he had no dealings in heroin with Sabbath or Agent Richards. [R. T. p. 166, lines 22-25.]

On direct examination appellant Mims was questioned as to his business dealings with Mr. Powell, the father of Frank Sabbath. These questions were objected to on the ground of irrelevancy and the objection was sustained.

When instructing the Jury, the Judge failed to give an instruction on the close scrutiny required to be used in weighing the testimony of accomplices and perjurers.

The questions presented are:

1. Is is reversible error to fail to instruct on the close scrutiny required to weigh the testimony of accomplices and perjurers where the only evidence connecting appellant with the crime is the testimony of the accomplice and perjurer?

2. Is it reversible error to restrict testimony as to business transactions between appellant and the father of the main witness for the Government where said transactions would show motive for falsifying testimony?

SPECIFICATIONS OF ERROR.

I.

The Court Erred in Failing to Instruct the Jury on the Fact That Testimony of an Accomplice Must Be Viewed With Extreme Caution and That Testimony of a Convicted Perjurer, Although Not an Accomplice, Must Also Be Viewed With Extreme Caution.

The Court's instructions on the testimony of witnesses is as follows [R. T. p. 215, line 25, to p. 218, line 25]:

"The witness is presumed to speak the truth. That applies to every witness that comes to the witness stand. But when they tell conflicting stories you have to reject the testimony of one or more and accept the testimony of one or more. In other words, you have to resolve the conflicts when the witnesses are in conflict, you take some and reject others.

"Now, a witness is presumed to speak the truth, but that presumption may be impeached. That is a legal word. It simply means, in effect, repelled, overcome, legally contradicted, so that you don't accept it any more. It may be impeached by many things.

"It might be impeached simply by reason of the base character of the witness who testifies. As reasonable men and women of adult years you will realize that there are people in life who are of such a character that you wouldn't accept their testimony just because of the kind of a person they are.

"You have heard the witnesses, and observed them. You are expected to size up the witnesses, to measure them somewhat as to the kind of people they are and to determine whether they are the type of person in whom you would have a lack of confidence because of the inherent gross character of the witness.

“You are expected also to see whether the witness’ testimony holds together in itself. Has that witness been one who has contradicted himself or herself? Has that witness at other times and places told different stories and, if so, what were the motivations.

“Consider also what the witness has to gain or lose or what the witness thinks he has to gain or lose from the testimony given in the case.

“When you consider the testimony of the defendant you measure it by the same standards as you measure the testimony of other witnesses, but you bear in mind the situation of a defendant. Likewise, you bear in mind the situations of these other witnesses.

“Sabbath, for instance, was a man who was charged in this same indictment. There are two counts, each of which would be subject to its own penalty if a defendant were convicted. The defendant Sabbath has testified to a story against the defendant Mims, and by ‘story’ I mean that in the sense of narrative. I am not trying to characterize it as either truth or fiction.

“Sabbath has given a narrative of the transaction, which is quite at odds with the narrative he gave of the transaction at an earlier time. There has been one charge dismissed.

“Now, does he feel, Sabbath, as he sat here on the stand, an obligation to go along with the story or narrative he gave here because of a desire to ingratiate himself with the authorities? Does he think he would do himself some good? Did he perhaps procure a dismissal of the one count by an offer to cooperate which, regardless of whether it was really an offer to cooperate, would be accepted by the Government as such, and the Government would be in the position of saying, ‘Well, here we have a penitent sinner who is going to cooperate with us. Let’s give him a break and dismiss one of the counts.’

“Was that the motivation of Sabbath in changing the story or was it the fact that Sabbath now is in prison and he was up here and if he testified falsely he would be subject to the pains and penalty of perjury, so he knew he had better tell the true story this time, regardless of what story he told to Richards earlier. Those are all questions which a jury will have to decide.

“If, when you decide them, you come to a frame of mind where you would say, ‘Well, I am just sure about it, that testimony of Sabbath is amply corroborated by the other witnesses and Sabbath was right,’ then there wouldn’t be any reasonable doubt.

“If you think, on the other hand, that Sabbath was wrong in the testimony he gave here you wouldn’t have any reasonable doubt. But if you find yourself in that frame of mind, where you just don’t know, after considering it you don’t feel that conviction of one position or the other, to where you can say that it exists to a moral certainty, then you would be in a state of reasonable doubt.”

No objection was made to the above charge.

It should be noted that at no time did the Court ever make mention of the testimony of Miss Barnett, nor is her name mentioned anywhere in the Court’s charge.

II.

The Court Erred in Forbidding Appellant to Inquire Into the Business Relationship Between Appellant and the Father of Frank Sabbath, the Main Witness for the Government.

The substance of the rejected testimony is as follows:

“Q. When was the first time that day that you had seen Reverend Powell? A. That morning, about 6:30.

* * * * *

Q. What did he come to your house about?

Mr. Ludlow: Your Honor, I am going to object to this. It is immaterial and irrelevant.

The Court: It calls for a conclusion. Sustained.”
[R. T. p. 148, lines 16-22.]

“Q. By Mr. Ridley: When he came to your house that morning did you have a conversation with him? A. Yes, sir.

Q. What was that about? A. He told me he was going to take that trust deed that he had given me and get me a house with it.

Mr. Ludlow: Well, your Honor, the question has been answered, but I object to that on the grounds of irrelevancy also.

* * * * *

The Court: Well, I think the business transaction and other areas of conduct than those of the subject matter of litigation are immaterial.” [R. T. p. 148, line 23, to p. 149, line 23.]

* * * * *

“Q. Well, how did you happen to get to the hotel? A. We were in my car. There was the suggestion we were to go out and look for a place. We were out all that morning looking for a place.

Mr. Ludlow: I would like to object to this now, your Honor. This is immaterial to the case on trial here.” [R. T. p. 150, lines 20-25.]

* * * * *

“The Court: Sustained.” [R. T. p. 151, line 22.]

* * * * *

“Q. (By Mr. Ridley): Prior to the time you got to the hotel, had you and Mr. Powell been in a fight or in an argument? A. Yes, sir.

Mr. Ludlow: Your Honor, I am going to object to that as immaterial . . .

The Court: . . . The objection is sustained and the answer is stricken and shall be disregarded.” [R. T. p. 151, line 23, to p. 152, line 10.]

When these objections were sustained, trial counsel for the defendant attempted to make offers of proof to show why the evidence was relevant. [R. T. p. 151, lines 3-14; p. 152, to p. 153, line 10.] A reading of the offers of proof as they appear in the transcript and making reference to counsel’s opening statement shows that defendant offered to prove

“that what actually happened here was that the defendant was engaged in arguments and fights with the co-defendant, Mr. Frank Sabbath, his father, a Reverend Parnell, Reverend Powell, both being the same man, who contacted Mr. Richards regarding Mr. Mims, concerning some trafficking at his hotel, a hotel in which Mr. Mims himself had some interest that will be evidenced by documents that are already in the clerk’s possession.

“Further, that Mr. Powell, or Reverend Powell, contacted Agent Richards some time prior to the approach that is involved here, and at the time he did so, Mr. Mims had already been in several arguments, from as early as July, regarding monies that he had given to Mr. Powell for a non-existent building or a building that had been condemned, and had been fighting and squabbling regarding the money.

“That in order to get even with and set Mr. Mims up, that Mr. Powell went to Agent Richards in this building and talked to him regarding some narcotic or narcotic buy at a hotel on Tenth Street, I believe, that Mr. Powell owned.” [R. T. p. 18, line 9, to p. 19, line 2.]

ARGUMENT.

I.

Where Sufficient Evidence to Prove Guilt Beyond a Reasonable Doubt Is Entirely Lacking Without the Testimony of Accomplices and Perjurers It Is Reversible Error to Fail to Instruct on the Caution That Such Testimony Should Be Received by the Jury.

The highly prejudicial effect that the failure to instruct the Jury on the caution necessary to view an accomplice's testimony and upon the fact that a convicted perjurer's testimony must be viewed with extreme care, can best be shown by an analysis of the evidence that was actually presented at the trial by the accomplice and by the convicted perjurer.

The testimony of Miss Barnett, the convicted perjurer, is particularly enlightening. Miss Barnett testified that at the time Agent Richards came in the room, she and Mr. Mims were already present. Then Mr. Sabbath came in the room. She testified that she saw Mr. Sabbath and Mr. Mims have a conversation and that Mr. Mims then left the room; then Mr. Sabbath gave a package to Agent Richards; Agent Richards gave Mr. Sabbath some money and then he (Agent Richards) left. Miss Barnett testified she actually saw a package handed by Sabbath to Agent Richards in the living room. [R. T. pp. 135, 136.]

However, this testimony clearly is false as shown by an analysis of the testimony of two other Government witnesses, namely, Agent Richards and the accomplice Sabbath.

Briefly, Agent Richards testified that after Sabbath came into the premises, Sabbath and Mims walked down

a hallway leaving Agent Richards and Miss Barnett in the living room; that Agent Richards could not hear the conversation or see what was going on down that hallway; that Sabbath came back and had a conversation with Agent Richards and then went back down the hallway; that Sabbath then came back again and had a conversation and told Agent Richards to follow him to another room down the hallway where the transaction took place. [R. T. pp. 28, 29, 30.]

Agent Richards testified, "I would say, about a minute or so after that Sabbath again came back to this location, at this time he told me to follow him. He then walked to and then entered this room which is located on the west portion of the hallway. At that time he took out a small brown package and said, 'Here is the stuff, open it.'" [R. T. p. 30, lines 16-21.] Later Agent Richards testified that "Just around this time there was a knock on the door and a woman's voice hollered out, 'Frank, I want to see you.'" [R. T. p. 31, line 24, to p. 32, line 1.] Later Agent Richards testified that he paid the \$150.00 to Sabbath while they were in the room. [R. T. p. 32, line 19.] Then to the question where was Mims at that time, Agent Richards testified, "The door was closed. However, after I came out of the room I observed Mims in the living room." [R. T. p. 32, lines 20-22.] This testimony clearly shows that the transaction that took place between Agent Richards and Sabbath happened behind closed doors and that consequently Miss Barnett could not possibly have seen the exchange. Further, the testimony of Sabbath also corroborates Agent Richards' testimony in the fact that the transaction where the handing of package from Sabbath to Richards, and the receiving of the money, took place out of the sight of Miss Barnett. [R. T. pp. 112, 113.]

Miss Barnett also testified that Mims gave Sabbath the package before Agent Richards ever got on the premises. [R. T. p. 134, lines 11-14.] However, Sabbath in his testimony states that he did not get the package from Mims until after Agent Richards was on the premises [R. T. p. 111], and further, that at the time he received the package from Mims, he was standing down the hallway out the sight of everybody else. [R. T. p. 111.]

This analysis of the testimony of Miss Barnett clearly shows that she is mistaken in every material point that she testified to. Everything she testified to was in direct contradiction to what Agent Richards and Sabbath testified the facts were. Miss Barnett could not have seen the exchange between Richards and Sabbath, because Agent Richards testified that the door was closed when the exchange was made. [R. T. p. 32, line 21.] Further, Miss Barnett could not have seen Mims give Sabbath the package because Sabbath testified that the package was given to him by Mims in the hallway after Agent Richards came to the house and not before. [R. T. p. 111, lines 10-23.] Therefore, Miss Barnett was lying.

Of course, it is the question of whether the effect of Miss Barnett's lies could have affected the outcome of this trial that is before this Court now, and to ask the question is to answer it. It shows why a cautionary instruction should have been given. On analysis, it can be seen that Miss Barnett has not told the truth in any material part of her testimony. However, without the close analysis that her testimony should be subject to, her testimony seemingly, on its face, corroborates that of Agent Richards and of Mr. Sabbath. If the Jury does not closely scrutinize the testimony, they probably would miss the obvious discrepancies between her testi-

mony and the testimony of Agent Richards and Mr. Sabbath and only remember the general tenor of her testimony. That is, the testimony that she saw Mims give Sabbath the package; saw Sabbath give the package to Richards; and saw Sabbath give the money which he obtained from Richards to Mims. This testimony is especially damaging when we realize that the only other testimony that directly connects Mims to this transaction is that of the accomplice Sabbath, and, as will be shown, the accomplice Sabbath had good reason to lie on the stand. Therefore, perhaps the only reason that the Jury believed Sabbath rather than the defendant Mims was because he was supposedly "corroborated" by Miss Barnett.

Once it is seen that the testimony of Miss Barnett is completely fabricated, then the only testimony that connects appellant with the sale in this particular case is the testimony of the accomplice Sabbath. And, of course, here we are faced, at the threshold, with the fact that Mr. Sabbath has everything to gain and nothing to lose by testifying for the Government. As his own testimony showed, Mr. Sabbath, who had been charged in a two-count indictment, was allowed to plead guilty to only one count. And, as he further testified, he was sentenced to tens years on that count, which was later reduced to five years on motion for reduction of sentence after Mims was convicted. [See Supp. T. R. pp. 1-5.] It may be seen from the record in this case, that after conviction, appellant was sentenced to fifteen years for the same count that Mr. Sabbath was sentenced to five years on. It also might be judicially noticed by this Honorable Court that it has been the practice in some cases for the trial courts of the Southern District of California, Central Division,

where a man has been convicted of more than one count in a narcotics charge, to run the sentences consecutively. We do not say that this is done in every case, but the fear of this is a great persuader, and could lead to Mr. Sabbath being very, very cooperative with Federal Agents in order that he might be allowed to have one count of the indictment against him dropped. This fact, coupled with the fact that Mr. Sabbath had previously been convicted of a felony, leaves his testimony to be thought of in a most unfavorable light.

A commentary on the effectiveness of Mr. Sabbath's testimony, as bolstered by Miss Barnett's testimony, may be found in studying the background of this case. The records show that appellant has been twice tried for this crime. His first trial led to a conviction by a jury, which conviction was set aside and a new trial granted by the trial judge. [R. T. p. 238, lines 19-22.] At the first trial, Miss Barnett did not testify [R. T. p. 202, lines 22-23], and therefore, the only corroboration of Agent Richards testimony, in fact the only evidence that connected appellant with the sale of the narcotics was that of the accomplice Sabbath. It seems clear that the learned trial judge in the first trial did not believe the accomplice Sabbath, or at least he did not feel that being an accomplice, his testimony was so worthy of belief as to convince the Judge that appellant was guilty beyond a reasonable doubt. [R. T. p. 238, lines 19-23.] However, on the retrial, the Government, recognizing this basic flaw in their proof, attempted to corroborate Mr. Sabbath's testimony with that of a convicted perjurer. The above analysis of the testimony of Miss Barnett shows that it is quite obvious she lied in her testimony, and, therefore, we are again faced with the proposition that

appellant had been convicted solely on the testimony of Mr. Sabbath. Yet this proof was not sufficient for the trial judge in the first trial, and should not be sufficient to sustain a conviction under any circumstances. Admittedly, the law is such that on appeal the conviction of appellant would not be reversed solely because the only incriminating testimony was that of an accomplice. However, in this case, there was no jury instruction sufficiently clear to apprise the Jury of the fact that an accomplice's testimony must be viewed with extreme caution and, of course, in this case, the facts are aggravated because of Miss Barnett's testimony, and the fact that there was no specific instruction relative to the attitude the Jury must take toward the testimony of a convicted perjurer. While the Judge made the conventional and usual instructions as to the weight that the Jury should give to the testimony of the witnesses, it is submitted that in the case at bar the facts are such that it was highly prejudicial to appellant for the Judge not to deliver more detailed instructions on the weight to be given testimony of one, an accomplice, and two, a convicted perjurer.

Appellant admits that trial counsel made no request for an instruction as to the close scrutiny to be given the testimony of an accomplice. And appellant admits that the failure to so instruct should be objected to as required under Rule 30, Federal Rules of Criminal Procedure. However, appellant contends that under Rule 52b, Federal Rules of Criminal Procedure, this honorable Court may notice the plain error committed by the trial court in neglecting to instruct on the testimony of accomplices and perjurers as it affected appellant's substantial rights. Rule 52b states, "plain errors or defects

affecting substantial rights may be noted although they were not brought to the attention of the Court.”

As stated in the notes of the advisory committee on rules, Rule 52b is merely a restatement of existing law. (18 U. S. C. 2555; *Wieborg v. United States*, 163 U. S. 632, 658, 16 S. Ct. 1127.)

The application of Rule 52b is clearly brought out in the case of *United States v. Levi* (7 Cir.), 177 F. 2d 827. This case was one where the defendant was convicted on a charge of conspiracy to steal government property. He appealed and his case was reversed, the basis for the reversal being the failure of the trial judge to instruct as to the close scrutiny to be given the testimony of an accomplice.

In *Levi* the Court said:

“Defendants here complain that although the Court gave the jury a cautionary instruction as to the creditability of defendants personal testimony, he gave no instruction as to the close scrutiny to be given the testimony of an accomplice. Such an instruction should have been given, but defendant’s counsel made no request for such instruction, and entered no objection or exception at the conclusion of the judge’s charge by reason of the failure to so instruct. Such objection is required under Rule 30, Federal Rules of Criminal Procedure. The omission to so instruct might have been an oversight, and had the trial judge’s attention been called to it by the objection prescribed in Rule 30, it is likely that an instruction on this subject would have been given. However, as this Court stated in *United States v. Perplies*, 165 F. 2d 874, we may follow *United States v. Atkinson*, 297 U. S. 157, 56 S. Ct. 391, 80 L. Ed. 555, and in the public interest notice errors to which

no exception has been taken, even though the 'exceptional circumstances' mentioned in the Atkinson case *supra*, 297 U. S. at page 160, 56 S. Ct. 391, are not present." (At p. 831.)

Then the Court in *Levi* summarized the evidence against the defendant and after the summary said:

"Certainly it cannot be said that evidence of the defendants guilt is 'overwhelming.' Although some suspicious circumstances were proved, sufficient evidence to prove guilt beyond a reasonable doubt was entirely lacking without the testimony of the accomplice, Ward. The jury was not warned of the frailty of such evidence." (At p. 831.)

It is submitted that the case at bar falls squarely within the rule of *United States v. Levi*. There is no question that although the testimony of Agent Richards created some "suspicious circumstances" sufficient evidence to prove guilt beyond a reasonable doubt was entirely lacking without the testimony of the accomplice Sabbath and the perjurer Barnett. This being the case it seems obvious that the failure to object as required by Rule 30 should not preclude appellant from raising these points in this Court. Rule 52b should be applied to this case as it was to *Levi*.

This Honorable Court in the case of *Morris v. United States* (9 Cir.), 156 F. 2d 525, aptly stated the proper rule to be applied in cases of this type:

"It is our opinion that the trial court committed fatal error in failing to instruct the jury on the statutes and regulations defining and governing the offenses charged against the appellant. No assignment of error was made at the trial governing this claimed error, but we consider it because, as is well

stated in *Suhay v. United States*, 10 Cir., 95 F. 2d 890, 893, ‘. . . where life or liberty is involved, an appellate court may notice a serious error which is plainly prejudicial even though it was not called to the attention of the trial court in any form.’ In a criminal case, it is always the duty of the Court to instruct on all essential questions of law, whether requested or not.” (At p. 527.)

The reasoning behind the theory that the testimony of an accomplice must be scrutinized with extreme care was well stated in *Freed v. United States* (C. A. D. C., 1920), 266 Fed. 1012. The Appellate Court reversed a conviction under the Mann Act where the Trial Court refused to give an instruction that the testimony of the accomplices should not be taken as that of ordinary witnesses, but “ought to be received with suspicion, and with the very greatest care and caution.” This instruction was refused by the trial court and the trial court gave only the conventional instruction as to the credibility of witnesses.

In support of their reversal the Court in *Freed* gave the following reasons:

“Not only were these witnesses [the witnesses for the prosecution] accomplices as to one another, but under the evidence they might have been found guilty of conspiracy . . . The testimony of the two male members of the party was even more tainted, for unquestionably under that testimony their conduct was as culpable as that of the defendant. The fact that they so freely implicated themselves in testifying against this defendant is significant, especially as it does not appear that either has been prosecuted. The situation confronting the trial court, therefore, was unusual. There was no direct evidence that was untainted. While it is not improbable that the same

result would have been reached, had the Court cautioned and advised the jury as to the danger of convicting upon the uncorroborated testimony of accomplices, it is not for us to speculate upon this question and resolve it against the accused. The charge of the Court fell far short, in our view, of the requirements of the situation. It amounted to nothing more than the general admonition, which it is proper for the Court to give in all cases.

“The question which the defendant sought to have brought to the attention of the jury, presenting a material, if not vital, issue in the case, was not even mentioned. Had the judge defined an accomplice, and brought sharply to the attention of the jury the character of the governments testimony against the defendant, it cannot be doubted that his counsel would have been in a better position to present his case to the jury, and who may say that the point of view of the jury might not have been different. . . . When we come to consider that in many jurisdictions it is a positive rule of law that no conviction may be had upon the uncorroborated testimony of an accomplice, the importance of the rule in this and other jurisdictions, requiring caution and advice in this connection, is apparent. The jury may convict without corroborating evidence, but in a case like the present the accused is entitled to have the Court first caution and advise the jury.” (At p. 1016.)

Then the Court in the *Freed* case concluded on page 1017 of the opinion:

“Believing that the defendant was not accorded the fair and impartial trial to which he was entitled, and that his interests may have been substantially affected, we are constrained to reverse the judgment and award a new trial. Surely, if it was the duty

of the trial court to caution and advise the jury in the respects pointed out, and we are certain that it was, nothing short of a reversal of the judgment will save the defendant from the harm that may have resulted from the want of such caution and advice.”

Not only is it serious error for a trial court to fail to instruct on the caution and care with which an accomplice's testimony must be received and that such error may be noticed on appeal even though it had not been objected to in the trial court, some courts require an even stricter instruction when there is testimony in the record by a convicted perjurer.

Where there is testimony of a convicted perjurer in the record, the Court *must* (emphasis added) charge that the testimony of such a witness must be scrutinized with care.

United States v. Katz (D. C., M. D. Tenn.), 78 Fed. Supp. 435, 438;

United States v. Margolis (3d Cir.), 138 F. 2d 1002, 1004;

United States v. Segelman (D. C., W. D. Tenn.), 83 Fed. Supp. 890.

In view of the above cited cases, and the fact that the only evidence in the case at bar, that directly connects appellant with the sale of narcotics was that of an admitted accomplice and a convicted perjurer, it is respectfully submitted that the trial court should have, on its own motion, instructed the jury as the caution and care with which it must scrutinize the testimony of an accomplice and a convicted perjurer.

Further, the above cited cases hold that the Court may notice the error of the trial court even though no objection was made to the instructions at the time they were given.

It has been held, in a case where no exception was taken to the charge to the jury and no error was assigned on appeal, the Court may still not be precluded from considering the unassigned error. The harshness of the sentence itself is justification for doing so.

United States v. Trypuc (2d Cir.), 136 F. 2d 900, 902;

Amendola v. United States (2d Cir.), 17 F. 2d 529, 530.

It seems evident that the case at bar comes squarely within the rule of Rule 52b, Federal Rules of Criminal Procedure, in that there was plain error affecting substantial rights of the defendant and said error may be noticed on appeal although it was not brought to the attention of the trial court.

II.

The Court's Failure to Allow Appellant to Testify to the Business Transactions Between Himself and the Father of the Main Witness for the Government, Frank Sabbath, Was Reversible Error Where Such Testimony Would Show That Appellant Had a Valid Reason for Being on the Premises Where the Narcotics Sale Took Place and Would Show Further Reasons for the Bias of Mr. Sabbath Against Appellant.

When the defendant took the stand, counsel tried to show a relationship between the defendant and Mr. Powell, said person being the father of the accomplice Sabbath [R. T. p. 43, lines 6-24], and also being the person who told Agent Richards that narcotics were being sold at the hotel. [R. T. p. 44, lines 3-14.] Since appellant's defense to the charge was simply that he did not participate in the sale of the narcotics nor did he know about

the sale of the narcotics it seems clearly relevant for him to attempt to explain his presence on the premises when the narcotics were sold. And this explanation should not be confined to a mere statement that he arrived there with Mr. Powell but should also include the transactions with Mr. Powell that had occurred previously on the morning of the sale and the general business relationship between the defendant and Mr. Powell. The Court would not allow any testimony as to the business transactions between the defendant and Mr. Powell. Yet this would clearly be relevant in showing the motive of Mr. Powell informing the police that the defendant was selling narcotics from the premises and also the motive for Mr. Sabbath to deliberately falsify his testimony so as to protect his father. The Court said, "Well, I think the business transaction and other areas of conduct than those of the subject matter of litigation are immaterial." [R. T. p. 149, lines 21-23.] Later Mr. Ridley proposed the following question. "Prior to the time you got to the hotel, had you and Mr. Powell been in a fight or in an argument." To this question plaintiff interposed an objection on the grounds that the question was immaterial and that the motive of the informant were immaterial. The Court sustained the objection saying among other things, "Whether it was done because someone was mad at the defendant or because someone was moved by civic virtue, or what not, does not make any difference." [R. T. p. 151; p. 152, lines 19-21.]

The proposed line of questioning to show that the defendant and Mr. Powell were engaged in business transactions and had some sort of an economic falling out are relevant because they show two things: One, that the defendant had a legitimate reason to be on the prem-

ises, that is, to conduct business with Mr. Powell and two, that because of these economic differences Mr. Powell and Mr. Sabbath might have reason to attempt to get the defendant in trouble.

In *State v. Mayberry* (Mo.), 272 S. W. 2d 236, defendant was accused of first degree murder of his wife's alleged paramour. At the time of the murder the decedent was living in the same house as the wife. The State sought to introduce evidence that the decedent had reasons for being in the house other than his relationship with defendant's wife. Over defendant's objection that, "that wouldn't make one bit of difference" the Court permitted a showing that decedent was paying board. Held, the evidence was competent as explaining deceased presence in the home on a theory other than his relationship with defendant's wife.

The general rule as to admissibility of evidence would seem to be that all facts having rational probative value are admissible in evidence, unless some specific rule forbids.

People v. Jones, 42 Cal. 2d 219, 266 P. 2d 38;

United States v. Grayson (2 Cir.), 166 F. 2d 863.

Evidence which might have considerable weight if defendants theory and testimony are believed by the jury should not be excluded.

People v. Brophy, 122 Cal. App. 2d 638, 265 P. 2d 593.

The modern tendency is to admit any evidence which may tend to illustrate or throw any light on transactions in controversy or be given any weight in determining

issue, leaving strength of such tendency or amount of such weight to be determined by the jury.

People v. Wilder, 135 Cal. App. 2d 742, 287 P. 2d 854;

Garner v. State, 83 Ga. App. 178, 63 S. E. 2d 225.

Generally, it is always relevant, where any act is shown or conduct charged against accused, for him to explain such act or conduct by showing some other hypothesis equally or more natural, as a reason for his conduct and such explanation should always be received.

Commonwealth v. Parshall, 139 Pa. Super. 161, 11 A. 2d 506.

Another purpose for which the testimony concerning business relations between Mr. Powell and the defendant was admissible was to show the bias of the witness Sabbath. The testimony shows that Sabbath was the son of Mr. Powell; that Mr. Powell was the one who accused Mims to Agent Richards as being a seller of narcotics; and that Sabbath, when he was arrested, told the police that he received the narcotics from his father. If appellant had been permitted to show that he had business dealings with Mr. Powell and that they had a falling out concerning these business dealings and that the son Frank Sabbath knew about this falling out prior to the time he testified in the case, then there arises an inference, which the jury might draw, that the conviction of appellant would be a financial gain to Mr. Powell and conceivably to his son, Frank Sabbath. And the conviction would nullify the damning accusation of father by son. Of course, the test is not whether the jury would have drawn these inferences but whether the jury might have drawn these inferences had the evidence been presented. It needs no citation of authority to support the proposition that

one of the greatest influences upon a man's testimony at a trial is his pecuniary interest in the outcome.

The case of *Furlong v. United States* (8 Cir.), 10 F. 2d 492, states the rule in the Federal Court as to impeachment of witnesses for bias. In the *Furlong* case the defendant attempted to cross-examine the government agents as to whether they entertained unfriendly feelings toward him. This line of examination was objected to by the government, and the objection was sustained. The Court said:

"This was clearly error. No rule is better established than the right to show the bias and prejudice of a witness towards a party to the suit as a part of his cross-examination. His answers are not relevant to the issue but they do throw a direct light on the creditability of his evidence. It is elementary doctrine that hatred, interest and ill-will are among the most potent forces in coloring testimony. Wigmore on Evidence, sections 945, 948, 950." (At p. 494.)

However the above action by the trial court in the *Furlong* case was not considered prejudicial for the simple reason that on direct examination the defendants were permitted to show the bias, prejudice, and ill-will of the two government witnesses, fully, giving all the details of the previous trouble between defendant and those witnesses. The action of the Court in the *Furlong* case was directly contrary to the action of the Court in the case at bar. In the case at bar, the defendant was not permitted to fully show all the details of the previous relations between himself and Mr. Sabbath and Mr. Sabbath's father, and of course, the bias that might be inferred from those relations. It is submitted that the *Furlong* case demonstrates the correct rule in the Federal Courts

and therefore the trial court in the case at bar was in error.

Certainly evidence is admissible by the defense to impeach the testimony of the plaintiff's witnesses. This testimony can be impeached by showing that the plaintiffs were biased against the defendant and said bias can be shown in many ways, one of which is to show that the plaintiff witness was attempting to avenge a wrong, whether real or imaginary, to his father. On this ground alone the evidence as to the prior transactions between Mr. Powell and the defendant should have been admitted.

See:

70 Corpus Juris 947, *et seq.*

Conclusion.

Certainly it cannot be said that the evidence of the defendants guilt is overwhelming. Although some suspicious circumstances were proved, sufficient evidence to prove his guilt beyond a reasonable doubt was entirely lacking without the testimony of the accomplice, Sabbath and the convicted perjurer, Barnett. The jury was not warned of the frailty of such evidence.

These circumstances, plus the fact that evidence to explain appellants presence on the premises where the narcotics sale took place was excluded, leads to the conclusion that the fair and impartial trial to which appellant was entitled was denied to him.

Wherefore, appellant prays this Honorable Court reverse the judgment below and grant appellant a new trial.

Respectfully submitted,

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